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Supreme Court, U.S.
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No. 08-115 JUL 21 2008

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In The
Supreme Court of the United States

AARON SCHWINN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

AARON SCHWINN #12176-041
855 Village Center Dr.
North Oaks MN 55126
#337
Pro se Petitioner

QUESTIONS PRESENTED

The following questions are presented by the petitioner:

I. Is a guilty plea entered into by a criminal defendant knowing, voluntary, and intelligent when that defendant has mental problems, his attorney *knows* he has mental problems, and his attorney pleads him guilty regardless?

II. Did the indictment in petitioner's criminal case fail to state an offense?

III. Was the indictment in petitioner's criminal case void for double jeopardy?

IV. Is it a denial of due process for a federal district court to deny a litigant before it the *reasons* for its rulings?

PARTIES BELOW

Petitioner Aaron Schwinn was the defendant-appellant in the court below. Respondent United States of America was the plaintiff-appellee in the court below.

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In The
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UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Aaron Schwinn, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, filed on March 25, 2008. There was no good-faith determination of the law in petitioner's case in either the district court or the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The Court of Appeals' Order denying the Petition for Rehearing and Petition for Panel Rehearing was filed on April 30, 2008 and is reproduced at Pet. App 1a. The Court of Appeals' Opinion affirming the judgment of Petitioner's conviction in the district court was entered March 25, 2008, is reproduced at Pet. App 2a-3a. The District Court's Order Denying Petitioner's Oral Motion to Withdraw Plea is reproduced at Pet. App. 4a-12a.

JURISDICTIONAL STATEMENT

The Court of Appeals' final judgment was entered on April 30, 2008. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution.

The Fifth Amendment, U.S. Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use,

without just compensation.

STATUTORY PROVISIONS INVOLVED

This case involves Federal Rule of Criminal Procedure 12(e).

Federal Rule of Criminal Procedure 12(e) provides:

> (e) Waiver of a Defense, Objection, or Request.
>
> A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.

STATEMENT OF THE CASE

Petitioner Aaron Schwinn pled guilty to two conspiracy counts. His "co-conspirator" was one Robert Cole. A summary of his Pre-Sentence Investigation ("PSI") reveals the lengths the Government will go to in order to maintain the "domino method of prosecution" and to use American citizens as the equivalent of "how many scalps to hang in the wigwam."

The offense conduct of Robert Cole was alleged to span a period from September 2003 through December 6, 2004. By comparison, the conduct of Petitioner was alleged to occur between September 3 and September 9, 2004. Based upon offense reports, the involvement of Petitioner with Robert Cole began sometime around August 3, 2004.

Cole had rented a warehouse for the receipt and unloading of large shipments of marijuana hidden in trailer truckloads of various commercial materials, *i.e.*, sand, cement, etc. After one shipment was

received in late July of 2004, Cole returned to the warehouse to clean up and Petitioner accompanied him for the purpose of possibly taking possession of the cement/sand materials left after removal of the marijuana.

At the time, Petitioner had an ongoing landscaping business and the materials could have been of potential use. The Confidential Informant ("CI"), from whom Cole was renting the warehouse, stated that Petitioner was present while the CI and Cole were discussing details of their venture and their dealings with the Mexican individuals (co-defendants of Cole in case number 04-cr-455). The CI stated that "Schwinn seemed aware of the situation" and he assumed Cole and Petitioner were somehow partners.

The balance of the evidence in the case consists of the wiretap recordings of conversations on the telephone of Robert Cole. Of the many hundreds of recorded telephone calls, approximately 30 are with Petitioner. Many of the calls are ambiguous, but are clearly about business "deals." However, this must be considered in light of the fact that Cole ran a stereo installation company and a telephone and communication company, while Petitioner ran a landscaping company.

Amongst the things discussed were the purchase of a one-ton truck, the possibility of Cole renting a house owned by Petitioner, the money Cole owes Petitioner for the Porsche automobile that Cole was buying from Petitioner, renting and/or installation of stereo equipment, problems with employees, etc. In some conversations, Cole is talking about his relations with some of the co-defendants in his case. And in some of the conversations there is apparent

discussion of drug deals.

But the relationship between Cole and Petitioner is far less clear than is described in paragraphs numbers 7-11 of the PSI. These paragraphs are essentially quoting from the offense reports, which summarize the agents incriminating interpretation of the conversations.

These conversations are not believed to have been transcribed, but Petitioner's attorney, Robert G. Davis, and his assistant reviewed these conversations and would note the following specifics by way of illustration:

Paragraph number 7 of the PSI states that Cole took delivery of 150 pounds of marijuana on July 26, 2004, which was then stored at Petitioner's residence. However, the affidavit in support of the search warrant application for Cole's residence in file number 04-cr-455 states that surveillance of Cole combined with the wiretap of his telephone indicates that on September 3, 2004, Cole was observed to pick up a 50-pound package of marijuana from hi own (Cole's) place of business for delivery to a customer.

Paragraphs numbers 10 and 11 describe conversations between Cole and Petitioner over Cole's purchase of cocaine from an individual later to be a co-defendant in Cole's case. The conversations are equally consistent with Petitioner being a customer rather than an accomplice; the defense disputes that Petitioner "gives advice to Cole on how to sell the cocaine."

What is telling about the wiretapped conversations, but not mentioned in Petitioner's PSI, are conversations Cole had with other people. Cole was apparently playing people off against one another, saying one thing to one person, and

something else to another. For instance, money he owes he claims other people owe. During a series of conversations, Cole discusses Petitioner with one Randy Meyer. Cole states that "Aaron is a guy to hang out with, but that's about it," and further speaks disparagingly of Petitioner. This is inconsistent with the implication in the disputed sections of the PSI that Petitioner was somehow partners with or directing Cole.

Unfortunately for Petitioner, such information was never considered by the prosecutor *or* Petitioner's attorney, Phil Resnick, who "pled him guilty." Resnick told Petitioner that, if he didn't plead guilty, "he would get 30 years," a scare tactic he has apparently used on other clients.

Petitioner, later realizing that his own attorney had been lying to him, asked attorney Phil Resnick to withdraw his plea. Resnick refused his client's instructions.

Even later, Petitioner realized that there were a number of problems with his indictment and his plea. Petitioner submitted motions challenging the sufficiency of his indictment and made an oral motion to withdraw his plea. His motion to withdraw his plea was denied, while his other motions were ignored.

Petitioner's first motion was accompanied by an Affidavit from Barbara Houk, M.D., addressing his mental state when he entered his plea. A paragraph from that evaluation bears repeating:

> HISTORY of PRESENT ILLNESS: Mr. Aaron Schwinn is a 37-year-old white man of German, Irish and Native American decent. He is a college-educated man; however, his presentation

would leave the untrained to guess otherwise. His sentences are too short and choppy. He has hesitation in his speech, although it is of a normal rate and rhythm for Missouri speech. But one should note, he is not from Missouri. He is from Minnesota. His speech should have been faster. It should have been closer to the rate of Ohio speech. He is frustrated by his short-term memory, which hampers his ability to manage his business. He now trusts his wife to do most of the administration of the main business. He is doing landscaping and back hoeing. This is more of physical labor. He is in pain due to the past injuries sustained over the years. His last motor vehicle accident (MVA) was June 2002. This event has caused him the most problems in his life. He stated that he had nearly recovered from the previous MVA and was doing well in his business ventures. This was why the family could afford a nice vacation. "Ever since June 2002, things have been getting worse. I just don't think like I use to. I'm in pain, I have headaches [pause] Doc., I can't concentrate. I work, but I hurt. My wife is really running the business. [Looking down, voice softer].

PAST PSYCHIATRIC HISTORY: Mr. Schwinn has a history of several head injuries. The issue of pain management is the reason he first started to see Dr. Cronin in 1991. He continued seeing the psychologist Dr. Cronin on an intermittent basis since then. He has ADD [older classification of Attention Deficit Hyperactive D/O without Hyperactivity] and

learning disorders. He was not treated in childhood. However, in college he experimented with marijuana and cocaine. As an adult in 1995, he sought help for the ADD. He tried Ritalin but discontinued it. Anxiety is treated in relationship to sleep apnea in a family practice setting.

PAST MEDICAL HISTORY: The patient has no known drug allergies. He experienced his first major head trauma at 8 years old. He was involved in a MVA, in which he hit the windshield and had a brief loss of consciousness. He was a professional wrestler. There were several times he has been knocked unconscious. In 1997 he was involved in which he experienced a brief loss of consciousness. Despite these head injuries he has never had symptoms of seizures. He denies exposure to toxic substances other than his brief use of marijuana and cocaine in college. He has sleep apnea, which ahs included chronic insomnia and anxiety. He has chronic pain of thc back, neck and head. His prescription medications are Provigil (treatment of sleep apnea with the use of CPAP machine at night and medication in the AM), Cymbalta (anti-depressant class medication used in pain control due to serotonin/norepiniphron reuptake inhibition action on the spinal cord), Roxicodone (narcotic pain control), Actiq (narcotic pain suckers for breakthrough pain), and the Duregsic patch (sustained release narcotic pain control).

Psychiatric Evaluation performed by Barbara J.

Houk, M.D.

Dr. Houk was not the only one to notice Petitioner's problems:

Neuropsychological Evaluation

Name:	Aaron Schwinn
Date of Birth:	2/22/68
Date of Evaluation:	11/4/05
Report Date:	11/15/05

Summary & Recommendations

This 37-year-old right-handed male was referred for a neuropsychological evaluation by his pain specialist, A.V. Anderson, M.D., following a head injury sustained in a 6/26/02 motor vehicle collision. It should be noted that I have essentially nothing in the way of medical records concerning this patient. Mr. Schwinn reported that striking his head in the 6/02 crash. He did not lose consciousness by have patchy memories for events immediately following the collision. Both the patient and his wife report a decline in his cognitive functioning subsequent to this accident. However, Mr. Schwinn's history is also significant for at least one previous motor vehicle collision with a head trauma and a brief loss of consciousness. The patient further reported sustaining minor head traumas with brief unconsciousness during the time in which he wrestled professionally. Mr. Schwinn reportedly has a history of attention

deficit disorder (ADD) as well as sleep apnea. He also has significant physical pain secondary to other physical injuries from the 6/02 crash. HE is referred at the current time by Dr. Anderson to delineate possible brain dysfunction as well as to aid with treatment for possible cognitive deficits.

Current testing reveals mild to moderate brain dysfunction which is likely multi-factorial. Mr. Schwinn obtained a Full Scale IQ score (of 85) which fell into the low average range. Performances in spelling and mathematical reasoning were significantly below expectation for an individual who nearly completed a college degree. I suspect that these difficulties are long-standing. It would be helpful to have educational records to review.

Basic attention and concentration skills are intact. Mr. Schwinn also demonstrated relative strengths in visuo-perceptual reasoning and short-term visual memory. In contrast, deficits in areas like verbal reasoning, phonemic fluency, confrontational naming, and short-term verbal memory strongly suggest mild left hemisphere dysfunction. Additionally, the patient demonstrated mild to moderate deficits in processing speed and executive reasoning.

It is difficult to precisely determine the contribution of the 6/26/02 head trauma on Mr. Schwinn's current cognitive functioning. I do note from his wife's account that he has significantly more difficulties with

concentration, memory, and the administration of his business. IN fact, she has apparently assumed many of the more administrative facets of his business including invoicing and billing. Thus, it does appear that this injury has contributed at least in part to the problems reported. However, the patient also has a history of ADD and potential learning difficulties, a number of old head injuries, sleep apnea, significant physical pain and pain medication, and psychological factors (including depression and anxiety) which are also contributing to his cognitive dysfunction. Overall, current testing reflected mild to moderate brain dysfunction (lateralizing slightly more to the left hemisphere) related to these various factors.

Mr. Schwinn is in need of assistance for his cognitive difficulties. Presently, he uses several small notebooks to write himself reminders. However, this system is haphazard and inefficient. I would recommend a period of cognitive remediation for education and the development of compensa-tory strategies for his processing, memory, and reasoning difficulties. Additionally, given indications of executive dysfunction, I have advised Mr. Schwinn that he should not make "snap" decisions concerning important matters like his business, money management, his children, and so on, without talking with his wife, or a trusted friend or family member.

Report of Thomas M. Misukanis, Ph.D., L.P.,

Defense attorney Phil Resnick was obviously not a "trusted friend."

Neither report was apparently considered by the district court as a reason for vacating Petitioner's plea.

The Court of Appeals, in which can most charitably be described as circular logic, found that Petitioner was competent to enter into the pleas "notwithstanding" (*i.e.*, ignoring) a psychiatric evaluation.

REASONS FOR GRANTING THE WRIT

The Writ must be granted for the reason that there is a conflict between the Circuit Courts of Appeals.

I. Petitioner's plea was not knowing, voluntary, and intelligent.

The sentencing hearing in the district court on October 31, 2006 makes it quite plain that even the sentencing judge realized Petitioner had problems.

The case law on this issue is quite clear.

Proof of a buyer-seller relationship without more is not sufficient to prove a conspiracy. *United States v. Prieskorn*, 658 F.2d 631, 633 (8th Cir. 1981).

Petitioner's attorney, Phil Resnick. never explained this to him.

> When Jeffrey Dean Howard pled guilty in federal district court, he was under the influence of a prescribed narcotic painkiller due to severe leg injuries from a motorcycle accident

and consequently, he claims, did not fully understand the nature and consequences of his plea agreement. Howard appeals the district court's denial of his 28 U.S.C. § 2255 habeas petition, arguing that his counsel's performance was constitutionally ineffective in permitting him, while incompetent, to acquiesce in a plea agreement he had seen for the first time just before he agreed to plead guilty.

Because there is no dispute that Howard was taking powerful narcotic drugs that could have dulled his mental faculties and because he has alleged specific, credible facts in support of his ineffective assistance of counsel claim, we conclude that the district court should have permitted Howard to develop these claims more fully in an evidentiary hearing. We have jurisdiction under 28 U.S.C. § 2253, and we reverse and remand.

United States v. Howard, 381 F.3d 873 (9th Cir. 2004).

The material upon which Kern's doctor based his expert opinion is a matter of court record with which Chief Judge Harper was thoroughly apprised, and was not a matter of personal knowledge of the doctor whose affidavit purported to establish Kern's insanity. Fed. R. Civ. P. 56(e), 28 U.S.C.A., specifically provides that such affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence. These mandatory provisions must be complied with.

Maddox v. Aetna Cas. & Sur. Co., 259 F.2d 51 (5th Cir. 1958); *Roucher v. Traders & General Ins. Co.*, 235 F.2d 423 (5th Cir. 1956); *Zampos v. United States Smelting, Refining & Mining Co.*, 206 F.2d 171 (10th Cir. 1953); *Person v. United States*, 112 F.2d 1 (8th Cir. 1940), *cert. denied*, 311 U.S. 672, 61 S.Ct. 35, 85 L.Ed. 432 (1940).

Kern v. Tri-State Insurance Co., 386 F.2d 754 (8th Cir. 1967).

Petitioner asked the district court to take judicial notice of these decisions. That motion with memorandum was ignored.

> Few aspects of our criminal justice system are as precious as the right to effective counsel and fair representation. We confront that issue squarely with this case and determine that Defendant Angela Ballard's attorney's failure to raise certain legal issues relevant to vacating her sentence on appeal prejudiced the outcome of her case. We therefore REVERSE the judgment of the district court and VACATE the Defendant's sentence. We REMAND this case to the district court for further proceedings consistent with this opinion.
>
> *Ballard v. United States*, 400 F.3d 404, 2005 Fed.App. 0125P (6th Cir. 2005).
>
> Our court is charged with ensuring equal justice under the law for all who come within the walls of our judicial system. If we turn a blind eye to

> the inequities that result from ineffective legal representation, we jeopardize the integrity of justice itself. It is with a deferential and respectful eye that we **REVERSE** the district court's decision and **VACATE** the sentence of Angela Ballard. We **REMAND** her case for re-sentencing in accordance with this opinion.
>
> *Id.*

As should be done in Petitioner's case.

Had Petitioner been in the Ninth Circuit Court of Appeals, a different legal standard would have applied.

II. Counts I and VII of the indictment in petitioner's case failed to state an offense.

Petitioner pleaded guilty to two conspiracy counts of the indictment. Both of those counts charged a violation of a *sentencing provision* as the object of each conspiracy, *not* a violation of 21 U.S.C. § 841(a)(1) as the object of each conspiracy.

The district court refused to address the issue of whether petitioner would be sentenced for what he was *charged with*, a conspiracy to violate a *sentencing provision*, as a violation of 21 U.S.C. § 841(b) or the object of a conspiracy.

Since Petitioner received a 40-month sentence, it is obvious that the district court sentenced him to a violation of a conspiracy with 21 U.S.C. § 841(a)(1) as its object.

Case law on this issue is quite clear.

> Constructive amendment of an indictment

constitutes reversible error and "occurs when the essential elements of the offense set forth in the indictment are [in effect] altered . . . by the prosecutor or the court after the grand jury has passed upon them." *United States v. Emery*, 186 F.3d 921, 927 (8th Cir. 1999) (quoting *United States v. Begnaud*, 783 F.2d 144, 147 n.4 (8th Cir. 1986)).

United States v. Barrios-Perez, 317 F.3d 777 (8th Cir. 2003).

A constructive amendment, which is reversible error per se, occurs when the essential elements of the indicted offense are altered, either actually or in effect, after the grand jury has issued the indictment. *United States v. Novak*, 217 F.3d 566, 574 (8th Cir. 2000). In order to determine whether the indictment was constructively amended, the court must consider "whether the admission of certain evidence created a 'substantial likelihood' that [the defendant] was convicted of an uncharged offense." *Id.* at 575.

United States v. Johnston, 353 F.3d 617 (8th Cir. 2003).

Petitioner raised this issue in a Motion for Clarification, which was also ignored by the district court.

That these were two counts of conspiracy, each alleging a violation of a sentencing provision, was no mere accident or typographical error.

III. The indictment in petitioner's case was and is void for double jeopardy.

Case law on this issue is clear.

> The double jeopardy clause prohibits the subdivision of a single conspiracy into multiple violations. *Braverman v. United States,* 317 U.S. 49, 52-54, 63 S.Ct. 99, 87 L.Ed. 23 (1942). In determining whether multiple conspiracies exist, this court uses a "totality of the circumstances" test with five factors as guidelines: "(1) time; (2) persons acting as co-conspirators; (3) the statutory offenses charged in the indictments; (4) the overt acts charged by the government or any other description of the offenses charged which indicate the nature and the scope of the activity which the government sought to punish in each case; and (5) places where the events alleged as part of the conspiracy took place." *United States v. Thomas*, 759 F.2d 659, 662 (8th Cir. 1985); *see also United States v. Kienzle*, 896 F.2d 326, 328-29 (8th Cir. 1990). "The essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement, each with a separate object." *Thomas*, 759 F.2d at 662.
>
> *United States v. Brown*, 926 F.2d 779 (8th Cir. 1991).
>
> It is well settled that the Double Jeopardy Clause prohibits the government from subdividing a single criminal conspiracy into multiple violations. *See United States v. Okolie*,

3 F.3d 287, 289 (8th Cir. 1993). "To support a double jeopardy claim, a defendant must show the multiple charges reflect the same offense, both legally and factually." *United States v. McDougal,* 133 F.3d 1110, 1113 (8th Cir. 1998). We review an alleged violation of the Double Jeopardy Clause de novo. *See United States v. Gladfelter*, 168 F.3d 1078, 1084 (8th Cir. 1999).

It is the defendant's burden to show a non-frivolous claim of double jeopardy. *See Okolie*, 3 F.3d at 289. If the defendant can make this initial showing, then the burden shifts and the government must show by a preponderance of the evidence that the two conspiracy indictments charge two separate offenses. *Id.* In determining whether two charged conspiracies are really the same one, a court must examine "the totality of the circumstances, including the time that the alleged conspiracies existed, the identity of the coconspirators, the statutory offenses charged in the indictments, the nature and scope of the activity charged, and the location of each conspiracy's events." *McDougal*, 133 F.3d at 1113.

The district court did not make a determination as to whether Aguilera's double jeopardy claim is frivolous. We have previously directed district courts to make a written finding as to whether such claims are frivolous or colorable, with a frivolous finding to be followed by expedited review on appeal. *See United States v. Brown*, 926 F.2d 779, 781 (8th Cir. 1991).

United States v. Aguilera, 179 F.3d 604 (8th Cir. 1999).

No determination was made in petitioner's case by the district court.

> In our opinion, if the government chooses to prosecute conspiracies separately, then prosecutors should be prepared to demonstrate that the criminal agreements are indeed separate and distinct.
>
> *United States v. Tercero*, 580 F.2d 312 (8th Cir. 1978).
>
> "'Multiplicity' is the charging of a single offense in several counts. . . . 'The vice of multiplicity is that it may lead to multiple sentences for the same offense.'" *Street*, 66 F.3d at 975 (quoting *United States v. Kazenbach*, 824 F.2d 649, 651 (8th Cir. 1987) (internal quotation omitted)). Idriss asserts that Counts 1 and 3 charge the same offense and therefore moves to dismiss Count 3. Based solely on the face of the indictment, the two counts certainly could charge the same offense. Count 1 charges Idriss with violation of § 472 "from about September 15, 2003 to on or about October 8, 2003." Count 3 charges Idriss with violation of § 472 "on or about October 8, 2003." However, in a hearing before the Magistrate Judge, the government made clear that the two counts refer to two separate incidents on two separate dates, one involving Kim and Rhee and the other involving Agent Samec. The two counts are therefore not

multiplicitous.

United States v. Idriss, 03-372(JRT/FLN) (D.Minn. 3/1/2004).

Petitioner had no hearing. The district court "just couldn't see it."

It is well settled that the government may not charge a single offense in several counts. *See Sanabria v. United States*, 437 U.S. 54, 66 n. 20 (1978) ("A single offense should normally be charged in one count rather than several, even if different means of committing the offense are alleged."). The purpose of this rule is to prevent multiple punishments for the same act, in violation of the Double Jeopardy Clause of the Fifth Amendment. *See United States v. Kimbrough*, 69 F.3d 723, 729 (5th Cir. 1995). In determining whether a course of conduct constitutes one or more separate crimes, we are guided by legislative intent. *See Sanabria*, 437 U.S. at 70.

United States v. Snyder, 189 F.3d 640 (7th Cir. 1999).

Kurti also argues the failure of his trial counsel to raise the multiplicity/double jeopardy issue constituted ineffective assistance of counsel, a claim which we will consider. *See United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004) (when faced with such a claim on direct appeal, the court may "decide the claim on the record

before us.") (citations and quotations omitted).

United States v. Kurti, 427 F.3d 159 (2nd Cir. 2005).

I.e., the Second Circuit and the Eighth Circuit appear to be at loggerheads on this issue. See *United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998), cited in the unpublished per curium ruling of March 25, 2008.

IV. Petitioner was denied due process in the district court's ruling(s).

Each and every member of the federal judiciary takes a solemn oath to support the Constitution and to judge impartially, see 28 U.S.C. § 453. In a system in which "the law" is whatever the "Lord of the Manor" says it is that is not how a Constitutional Republic is administered, that is the *feudal system*.

Our legal system is not supposed to operate like something out of the Dark Ages.

THE COURT: Denied; that's right.

MR. KATZ: May I ask the reasons, your Honor?

THE COURT: Just because I said it, Counsel.

I could stop right here and have no trouble concluding that the judge committed misconduct. It is wrong and highly abusive for a judge to exercise his power without the normal procedures and trappings of the adversary system—a motion, an opportunity for the other

side to respond, a statement of reasons for the decision, reliance on legal authority. These niceties of orderly procedure are not designed merely to ensure fairness to the litigants and a correct application of the law, though they surely serve those purposes as well. More fundamentally, they lend legitimacy to the judicial process by ensuring that judicial action is-and is seen to be—based on law, not the judge's caprice.

In re Complaint of Judicial Misconduct, 425 F.3d 1179 (9th Cir. 2005).

RANDOLPH, Circuit Judge: When a district court's ruling on a pretrial motion involves factual issues, Rule 12(e) of the Federal Rules of Criminal Procedure commands the court to "state its essential findings on the record." The rule serves several functions. Findings on the record inform the parties and other interested persons of the grounds of the ruling, add discipline to the process of judicial decision-making and enable appellate courts properly to perform their reviewing function. If the district court not only fails to make "essential findings on the record," but also expresses nothing in the way of legal reasoning, if it simply announces a result, it may frustrate these objectives. We say "may" because there are cases in which the facts are so certain, and the legal consequences so apparent, that little guesswork is needed to determine the grounds for the ruling. This is not such a case.

United States v. Williams, 951 F.2d 1287 (D.C. Cir. 1991).

If we knew the district court's legal reasoning in this case, we might have little difficulty in ascertaining the pertinent but unstated findings underlying it, as did the *Caballero* court. If we knew what facts the district court considered "essential" to its ruling (Rule 12(e)), we might be able to piece together the unstated legal grounds for its decision. But we have neither essential findings nor legal reasoning. As Chief Justice Hughes wrote, "it is always desirable that an appellate court should be adequately advised of the basis of the determination of the court below . . . ." *Public Service Comm'n v. Wisconsin Tel. Co.*, 289 U.S. 67, 69-70, 53 S.Ct. 514, 77 L.Ed. 1036 (1933).

Id.

Plain error exists if the district court deviates from a legal rule; the error is clear under current law; and the error affects substantial rights, which ordinarily means that the error affects the outcome of the proceedings. *United States v. Olano*, 507 U.S. 725, 732-35 (1993).

Rahn v. Hawkins, 464 F.3d 813 (8th Cir. 2006).

See also *United States v. Olano*, 507 U.S. 725, 736 (1993) (need to correct errors that seriously affect the "'fairness, integrity or public reputation of judicial proceedings'"). That is to say, it would diminish that

public confidence in the criminal justice system upon which the successful functioning of that system continues to depend. A *bribe* a litigant can understand. Failure to issue *reasons* for a ruling is beyond a litigant's ability to comprehend.

There is nothing that diminishes respect for the public reputation of judicial proceedings more than to have one's grievances and petitions airily brushed aside *with no reason* for the court's rulings(s).

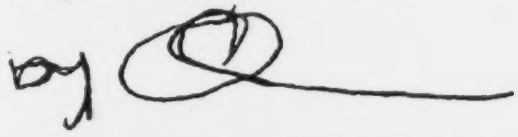
If this Court is truly concerned about the loss of "judicial independence" at the hands of today's Congress, it might want to consider why the voters are so dissatisfied with the federal judiciary and why there is such a rising tide of voters complaining to Congress.

This case in the district court furnishes a perfect example.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: July ___, 2008